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Nos. 93-1000 and 93-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC.,

Petitioners,

v.

MARK JACKSON and LAURIE JACKSON,

Respondents.

ALLIED-BRUCE TERMINIX COMPANIES, INC., and TERMINIX INTERNATIONAL COMPANY,

Petitioners,

v.

G. MICHAEL DOBSON, WANDA C. DOBSON, STEVEN GWIN and JAN GWIN,

Respondents.

On Petition for Writs of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR PETITIONERS

H. BARTOW FARR III *
FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Additional counsel on inside cover

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ROBERT E. SASSER
DOROTHY WELLS LITTLETON
SASSER & LITTLETON, P.C.
One Commerce Street
Post Office Box 388
Montgomery, AL 36101
(205) 834-7800

JOSEPH P. JONES, JR.
T. JULIAN MOTES
SIROTE & PERMUTT, P.C.
One St. Louis Centre
Post Office Drawer 2025
Mobile, AL 36652
(205) 432-1671

TABLE OF AUTHORITIES

Cases	Page
Ex Parte Lorance, No. 1930140, 1994 Ala. LEXIS 62 (Sup. Ct. Feb. 11, 1994)	4
Foster v. Turley, 808 F.2d 38 (10th Cir. 1986)	2
Lopez v. Home Buyers Warranty Corp., 628 So. 2d 361 (Ala. 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (Dec. 22, 1993) (No. 93-995)	4
Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961)	3, 4
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	5
Perry v. Thomas, 482 U.S. 483 (1987)	5
Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960)	4
Southland Corp. v. Keating, 465 U.S. 1 (1984)	5

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REPLY BRIEF FOR PETITIONERS

The petitions in these cases made two principal points: that different courts have employed markedly different approaches in deciding whether Section 2 of the Federal Arbitration Act makes agreements to arbitrate enforceable as a matter of federal law; and that the court below—in aligning itself with courts that apply Section 2 only when the parties "contemplated substantial inter-

state activity" at the time of their agreement—had chosen a reading of Section 2 that is contrary to both its language and purpose. In their briefs in response, respondents do not seriously argue that Congress intended to make agreements to arbitrate enforceable only if the parties "contemplated substantial interstate activity": indeed, neither brief makes any effort to defend that standard by reference to the language of Section 2, or its underlying policies, at all. Rather, the briefs simply contend, in a number of related ways, that the conflict among state and federal courts on this issue should be treated as immaterial. These contentions are uniformly unpersuasive.

1. The Dobson respondents initially argue that the transaction at issue here would not fall within the terms of Section 2 under *any* test currently being applied by state and federal courts. Dobson Br. at 3-6. But respondents' own discussion proves just the opposite. Although the facts set out in their brief—showing an agreement among parties in different states and the use of materials shipped in interstate commerce—were held insufficient by the Alabama Supreme Court to demonstrate that the parties "contemplated substantial interstate activity" (Pet. App. 6a-7a), they plainly *do* demonstrate a sufficient nexus to interstate commerce under the test employed by most federal courts. The Tenth Circuit has held, for example, that "[t]he requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause," *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986), and it is beyond question that Congress would have the "power . . . under the Commerce Clause" to regulate transactions between parties in different states involving materials that move in interstate commerce. Thus, in this case as in many others, the choice regarding the test to be applied is dispositive with regard to whether an agreement to

arbitrate is or is not enforceable as a matter of federal law.[1]

2. The principal thrust of respondent Dobsons' brief, echoed in respondent Jacksons' brief, is that the Court need not be concerned about the different tests for applying Section 2 that are employed by different courts. Dobson Br. at 6-11; Jackson Br. at 6-9. In particular, the Dobson respondents argue that the courts adopting the contemplation-of-the-parties test "do so in an effort to *broaden* the construction of the term 'involving commerce' not narrow it." Dobson Br. at 8. This argument is faulty on a number of grounds.

To begin with, it is nonsensical to say that a test requiring contemplation of *substantial* interstate activity will subject more transactions to the reach of federal law than a test requiring only a slight nexus with interstate activity.[2] Indeed, the former test—articulated by Judge Lumbard in *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961) (concurring opinion)—grew out of Judge Lumbard's disagreement with the view, taken by

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[1] The Dobson respondents do not dispute that the transaction *in fact* involved materials shipped in interstate commerce; rather, they say that this interstate movement would not "necessarily" occur in every case. Dobson Br. at 5. But that is simply another way of saying that the parties would not necessarily "contemplate" that activity at the time of their agreement. Under the standard adopted by the court below, of course, the fact of interstate commerce is not enough to require application of Section 2. It *is* enough under the test applied by most other courts.

[2] It is possible that the parties might contemplate substantial interstate activity in a transaction that, for some reason, turns out not to involve any at all. But it seems highly doubtful that courts employing the contemplation-of-the-parties test would actually find Section 2 applicable in those circumstances and, if they did so, it would raise serious questions about the power of Congress to preempt state law with respect to transactions having no nexus in fact to interstate commerce.

the Second Circuit in a previous case, that "Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements." *See id.* at 386 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960)). Judge Lumbard was instead of the opinion that the federal courts "must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." 287 F.2d at 386. Given that approach, it is hardly surprising that the test not only requires that the parties actually contemplate interstate activity but that the interstate activity, in addition, be substantial.

It is also crystal clear that—even if some other court thought so—the *Alabama Supreme* Court does *not* think that the test is "broader" than the actual nexus test. Indeed, that court has flatly stated that it elected to apply the contemplation-of-the-parties test because it "better promotes our strong public policy *against* the use of predispute arbitration agreements." *Lopez v. Home Buyers Warranty Corp.*, 628 So. 2d 361, 363 n.2 (Ala. 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (Dec. 22, 1993) (No. 93-995) (emphasis added).[3] This declaration, not mentioned by respondents, shows two things: first, that the test does restrict the application of Section 2 and, second, that it may be deliberately employed for that purpose by courts hostile to federal policy.

In any event, the relevant issue ultimately is not whether one test is broader or narrower than the other, but whether the test used below properly reflects Congress' intent in

[3] Since the petitions in these cases were filed, the Alabama Supreme Court has reaffirmed its commitment to the contemplation-of-the-parties test, again using it to deny enforcement of an agreement to arbitrate. *Ex Parte Lorance*, No. 1930140, 1994 Ala. LEXIS 62 (Sup. Ct. Feb. 11, 1994).

enacting Section 2. This Court has said that "the Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987). As we have set out in the petitions, *see, e.g.*, Dobson Pet. at 8-12, the contemplation-of-the-parties test finds no basis in either the language of Section 2 (which speaks objectively of "transaction[s] involving commerce") or in its purpose (to put arbitration contracts on the same footing as all other contracts). It thus imposes an unjustified limitation on the power of Congress to make arbitration agreements fully enforceable as a matter of federal law.

3. This Court has expressed an "unwilling[ness] to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (holding that Section 2 must be applied in state as well as federal courts). But, if state and federal courts are free to interpret Section 2 in light of their own preferences about the enforceability of arbitration agreements, the scope of federal law will necessarily depend "on the particular forum in which it is asserted." *Id.* Thus, whatever the correct standard may be, a lack of uniformity in the application of Section 2 is flatly inconsistent with Congress' efforts to "create a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). This Court should grant review to correct it.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR III *
FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

ROBERT E. SASSER
DOROTHY WELLS LITTLETON
SASSER & LITTLETON, P.C.
One Commerce Street
Post Office Box 388
Montgomery, AL 36101
(205) 834-7800

JOSEPH P. JONES, JR.
T. JULIAN MOTES
SIROTE & PERMUTT, P.C.
One St. Louis Centre
Post Office Drawer 2025
Mobile, AL 36652
(205) 432-1671

* Counsel of Record

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